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No. 10-801

Supreme Court, U.S.
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In The
Supreme Court of the United States

JOSE VALLE, *et al.*,

Petitioners,

v.

CITY OF HOUSTON, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What must plaintiffs show to establish deliberate indifference in a failure-to-train claim?

2. If an official has decisionmaking authority that is subject to review, can he be elevated to a policy-making authority?

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, City of Houston, requests that this Court deny the petition for writ of certiorari seeking review of an opinion of the United States Court of Appeals for the Fifth Circuit, and presents in support of its request:

STATEMENT OF CASE

Omar Esparza was fatally shot by Houston police officers after Mr. Esparza's family had called 911 because Mr. Esparza locked his family, including his parents, out of their home. Houston police officers, including a crisis intervention officer, arrived at the home. The officers talked to Mr. Esparza, but he refused to leave the house or let the officers into the house. Eventually, a four-man team, armed with soft impact weapons, Tasers, and firearms, made entry into the home through an unlocked door. Petitioners, who were plaintiffs and appellees below, Jose Valle, individually and as representative of the estate of Omar Esparza, and Asuncion Valle, alleged that the shooting violated the civil rights of their son, bringing a cause of action against the City of Houston without joining any of the individual officers involved in the incident.

Mr. Esparza began behaving in an unusual manner in late 2006. Although his family sought psychiatric treatment for Mr. Esparza, he had not yet

been treated. On Sunday, January 7, 2007, Mr. Esparza became upset after the family returned home from a local restaurant. Mr. Esparza went inside the family home and locked his family out. Eventually, petitioners called 911 for assistance.

The 911 dispatcher sent Houston Police Department (HPD) officers to respond to the call. HPD Officer J. Duarte arrived at the scene and began to talk to Mr. Esparza through the locked front door. HPD Officers S. Walsh, J.D. Seay and R. Chaisson also joined the conversation with Mr. Esparza after their respective arrivals. HPD Sergeant A.R. Bryant assumed control over the scene when he arrived. Sergeant Bryant also established communication with HPD Headquarters and was in contact with Captain D. Williams of the Special Weapons and Tactical/Hostage Negotiations Team (SWAT/HNT). HPD Officer C. Broussard, a crisis intervention team (CIT) specialist who was trained to deal with citizens with mental-health issues, also arrived at the scene.

Officer Broussard began to negotiate with Mr. Esparza at the front door, but ceased the discussion when Mr. Esparza was no longer willing to talk. Meanwhile, Sergeant Bryant had again spoken with Captain Williams about the situation and called the other officers at the scene together to discuss a plan for entering the home. When the officers entered the home, Mr. Esparza charged at the officers with a hammer. Sergeant Bryant discharged non-lethal soft-impact beanbags, but could not stop Mr. Esparza. Officer Walsh discharged his Taser, but the darts did

not make contact with Mr. Esparza. Officer Chaisson discharged his service pistol. Although some of the bullets missed Mr. Esparza, Mr. Esparza was fatally shot.

In 2004, HPD reviewed a proposal that recommended that all HPD patrol officers to complete twenty-four hours of CIT training and that all patrol sergeants complete CIT training. The purpose of this training was to make more CIT-trained officers available to respond to calls for service. The proposal suggested that if HPD dispatched "a non-CIT officer to a CIT call and the officer shoots and kills the mental health consumer, the community will ask why [HPD] didn't use a CIT officer" and that HPD "could be liable if a CIT officer was available but not used."

At the time of Mr. Esparza's death, (1) not all other police departments certified all of their officers in CIT; (2) there was no "industry" standard of certifying all patrol officers and/or sergeants in CIT; (3) the training provided by HPD was comparable to, if not superior to, that provided by other police departments; and (4) the training provided by HPD exceeded that required by the Texas Commission on Law Enforcement Officer Standards and Education (TECLOSE). The City's policy on CIT training did not fall short of the requirements of the State of Texas nor was inferior to the training provided by other police departments such as those in Los Angeles, Memphis, Denver, or Seattle. Not only did HPD's CIT training follow national standards, but certifying all

officers in CIT was not a universally accepted practice because of differences in policing philosophies.

Neither the district court nor the court of appeals concluded that a policymaker could be charged with actual or constructive knowledge of the alleged inadequacy of the CIT training, but rather noted that there was a question of fact regarding whether the decision not to implement the 2004 proposal constitute an official policy or custom of inadequate CIT training, of which a policymaker had actual knowledge. Instead, both courts recognized there is no constitutional right to have a CIT call answered by non-CIT-trained officers, that a shooting death was not the highly predictable consequence of the alleged failure to train, and that the City was not deliberately indifferent.

The courts below also recognized that Captain Williams was not a final policymaker who possessed final authority to establish municipal policy, but was rather a decisionmaker who exercised his discretion in carrying out the City's policy.

REASONS FOR DENYING THE WRIT

The Fifth Circuit properly required a demonstration of a pattern of violations to establish municipal liability because the alleged lack of training did not lead to obvious constitutional violations. The decision below regarding decisionmaking and policymaking

authority was a plainly correct application of settled law and does warrant review by this Court.

ARGUMENT

I. THE FIFTH CIRCUIT PROPERLY REQUIRES THE DEMONSTRATION OF A PATTERN OF CONSTITUTIONAL VIOLATIONS

A. This Court has provided clear guidance in determining whether a municipality shows deliberate indifference in a failure-to-train context.

This Court has explained that "in light of the duties assigned to the specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). To establish deliberate indifference, the plaintiff must show a pattern of similar violations that would make it obvious that more training is necessary or that the need for training is obvious based on the nature of the conduct at issue and the potential for harm. *See id.* The deficiency in training must be the actual cause of the constitutional violation.

B. The Fifth Circuit properly required a showing of a pattern of constitutional violations to establish deliberate indifference.

The training that petitioners complain the City failed to provide was CIT training to all patrol officers and all patrol sergeants. However, there is no constitutional right to have a CIT-trained officer respond to a CIT call nor is it constitutional violation for a non-CIT-trained officer to respond to a CIT call.

Even assuming the Fifth Circuit correctly found that the City was aware for a potential for constitutional violations in situations involving mentally ill persons where non-CIT-trained officers responded to a call, there was no link to show deliberate indifference. The proposal noted that more than 70 percent of all CIT calls had been cleared by non-CIT-trained officers but there is no indication that any of those calls actually resulted in any constitutional violation similar to that which petitioners suffered or any constitutional violations at all. Likewise, there is no indication that the other mentally ill citizens who were unarmed or carrying objects and shot by HPD officers involved the use of excessive force. The CIT training proposal did not address any potential specific or obvious constitutional violations. An officer who had not received formal CIT training or was not trained in de-escalating a situation with a mentally ill person would not automatically violate any constitutional rights of any mentally ill person with whom the officer interacted. Because the potential for

specific harm as a result of the actions of non-CIT-trained officers is not clear, deliberate indifference must be demonstrated through a pattern of violations that makes it obvious to the policymakers that more training is necessary. *Id.*

In contrast, the very training that is the subject of *Connick v. Thompson*, 553 F.3d 836, *reh'g en banc*, 578 F.3d 293 (2009), *cert. granted*, No. 09-571 (U.S. argued Oct. 6, 2010), focused on a very specific, well-defined policy, which if violated, would automatically result in a constitutional violation. An assistant district attorney who was not trained in the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), however, would infringe on a criminal defendant's civil rights. The circumstances under which a failure-to-train claim can succeed without showing a pattern of constitutional violations is very narrow. *Board of the County Commissioners v. Brown*, 520 U.S. 397, 409 (1997).

The courts below did not stray from this Court's guidance by requiring petitioners to show a pattern of violations here because there was no evidence that the HPD officers would automatically violate citizens' rights if they did not receive CIT training. Although the City knew that mentally ill citizens had been shot by HPD officers, there is no indication that the City knew whether these officers were CIT-trained or whether these shootings were uses of excessive force. Thus, because the need for training was not obvious, the Fifth Circuit properly required a showing of a pattern of constitutional violations to establish

deliberate indifference in accordance with *City of Canton*, 489 U.S. at 390.

II. THE FIFTH CIRCUIT PROPERLY DISTINGUISHES DECISIONMAKING AUTHORITY FROM POLICYMAKING AUTHORITY

A. This Court has provided clear guidance in distinguishing decisionmaking authority from policymaking authority.

This Court has explained that a municipal policymaker is one who has "the responsibility for making law or setting policy in any given area of a local government's business." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 125 (1988). "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action order." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986). Whether the decisionmaker may be considered a final policymaker for purposes of imposing municipal liability is a question of state and local law which is best decided by the Court of Appeals. *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701, 738 (1989). This requires the examination of "the actual function of a government official, in a particular area, [which] will necessarily be dependent on the definition of the official's function under relevant state law." *McMillan v. Monroe County*, 520 U.S. 781, 786 (1997).

Whether a subordinate's decision may be elevated to a policymaking decision depends on whether

the subordinate's decision is constrained by policies and whether the subordinate's decision is subject to review by the municipality's authorized policymakers. *Praprotnik*, 485 U.S. at 127.

B. The Fifth Circuit properly distinguished decisionmaking authority from policymaking authority.

The Fifth Circuit properly considered state and local law within this Court's framework in determining that Captain Williams was a decisionmaker rather than a final policymaker. Captain Williams' actions were not final. The approach that petitioners suggests would result in *respondeat superior* liability and confuses the distinction between decisionmaking authority and final policymaking authority. *See id.* at 126 ("If the mere exercise of discretion by an employee could give rise to [liability for] a constitutional violation, the result would be indistinguishable from respondeat superior liability.").

Although Captain Williams had the authority to use his discretion in how to handle special threats on a day-to-day basis, he was constrained by the policies officially set forth in the HPD General Orders. As a police captain, Captain Williams had been delegated discretion in carrying out policy as outlined in the General Orders and Standard Operating Procedures.

Captain Williams' actions were also subject to review by the Chief of Police as petitioners concede that Captain Williams was disciplined by HPD. The

fact that Captain Williams had made these types of decisions routinely does not preclude the fact that his decisions were still subject to review as there is no requirement that every decision actually be reviewed to be considered "subject to review." Thus, there is no indication that the City attempted to delegate decisionmaking authority without reviewing Captain Williams' actions. The policymaker concluded that Captain Williams violated policy. That Captain Williams' discipline was ultimately overturned by a civil service examiner because he had "acted within the policies and procedures of the police department" further demonstrates that his actions were subject to the policies promulgated by a policymaker who was not the decisionmaker.[1]

The decision below regarding decisionmaking and policymaking authority was a plainly correct application of settled law and does warrant review by this Court.

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[1] There is no suggestion that the Civil Service Hearing Examiner is the policymaker.

CONCLUSION

For the reasons given above, the petition should be denied.

Dated: March 21, 2011
Houston, Texas

Respectfully submitted,

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